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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 269

R. K. LAROS COMPANY, now PHARMACHEM CORPORATION AND CUTTER LABORATORIES,

Petitioners,

vs.

BENGER LABORATORIES LIMITED AND ARMOUR AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT BENGER LABORATORIES, LTD. IN OPPOSITION.

CHARLES J. MERRIAM,
JEROME B. KLOSE,
30 West Monroe Street,
Chicago 3, Illinois,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

Benger Laboratories, Ltd., one of the respondents, opposes the petition for writ of certiorari.

Petitioners have correctly referred to the opinion below. Their statement of jurisdiction needs no correction.

ARGUMENT.

PETITIONER RAISES FALSE ISSUES.

There is no conflict between the decisions below and the decision of any other Court.

Invention is a question of fact. There are concurrent findings of the District Court and the Court of Appeals that the invention in this case was unobvious. There is no conflict between such a decision and that of any other Court.

Petitioner, like all other litigants who have lost twice below, seeks in effect a retrial of the factual issues (which it also sought in the Court of Appeals). It seeks to influence this Court by a recital of some of the facts in the case, completely divorced from the other facts. None of these facts was neglected by either Court below, nor can Petitioner expect this Court to inquire into the very extensive and very technical evidence to determine whether or not the District Court and the Court of Appeals did their duty. Judge Kirkpatrick in the District Court and the three judges of the Court of Appeals did carefully and thoroughly consider the situation.

The *Application of Larsen*, 292 F. 2d 531 (C. C. P. A. 1961) decision relied upon by Petitioner was one in which *all* the claims in issue were held unpatentable. The fairness of Petitioner's argument may be judged when Petitioner says this is in conflict with other cases also denying patentability.

The method claims in this case are not involved. The District Court held them unpatentable, something with which we did not agree but which we accepted by disclaimer. Obviously, if the product is covered, it is not of importance whether the method of making it is also covered. The dis-

claimer of the method does not admit that the method was part of the prior art. Judge Learned Hand stated in *United Chromium, Inc.* v. *International Silver Co.*, 60 F. 2d 913, 914, 915 (2d Cir. 1932):

> "Much of the defendant's argument depends upon an illegitimate inference from the disclaimer; that is, that it conclusively concedes all the disclosure to have been in prior art except the regulation of the bath after it was formed. . . .
>
> "It seems to us that these decisions are right; the patentee has indeed abandoned a part of his original monopoly, and this because he fears that he has gone too far; his fears may not be justified. There is no reason to impute to his caution a declaration about what the prior art actually contains. . . . The function of a disclaimer ends with the retrocession introduced; the patentee is still free to show that the claim covers only a part of what it might. In the case at bar the regulation of the bath was not the invention; it was a trivial part of the claims. . . . As is generally the case in chemical processes, the important thing was to eliminate the inessentials. . . ."

The invention here is an important one. Iron is a necessary element in the body. Iron taken by mouth is not always satisfactory and is always disagreeable. Intravenously taken iron is not always satisfactory and injection requires specialized medical attention. In the case of animals, intramuscular injectability is an economic necessity. In humans it is extremely desirable and convenient.

Before the present invention the entire art sought an iron compound which could be intramuscularly injected. All efforts were without success. London and Twigg discovered, to their own surprise, that the range of below 70,000 molecular weight dextran out of a total range up to 3,000,000 or more, could combine with iron to form a complex which was stable in the blood and could be injected

intramuscularly. All previous iron complexes had to be alkaline to be stable. This iron complex was stable in acid. No one yet knows why. No one else has found a different compound with the same properties.

There are thousands of high molecular weight carbohydrates. Many of these will "peptize" iron hydroxide in a very caustic solution to form an unstable mixture. Such highly alkaline materials can be injected intravenously but when given intramuscularly they break down due to their lack of stability and the alkali causes great discomfort and suffering.

They can be held in the unstable form as long as they are highly alkaline. None of these mixtures is stable when made neutral or acid. As a result, not one of them can be injected intramuscularly.

Thus, the statement in petitioner's brief that the courts below found that it was obvious that iron dextran could be injectable intravenously is highly misleading because the things which could be injected intravenously are mixtures and it could not have been anticipated that an acid stable iron dextran complex could be produced.

This is not simply a difference in degree but a complete difference in kind. Iron dextran is an acid stable complex. All of the others are mixtures.

The value in the animal field is ever more spectacular than in the human. All pigs develop iron deficiency anemia and the use of iron-dextran actually saves the lives of some 20% of the pig crop in addition to stimulating growth. There is nothing whatever to indicate that dextran would have any different quality with respect to iron than any other material.

The invention was important and it was immediately copied by defendant, who procured samples of plaintiff's material and proceeded to analyze and copy it.

ANTI-TRUST ISSUES

The anti-trust allegations are obviously included to whet the interest of this Court. They have no substance.

Title 35 U. S. C. § 261 provides specifically for the granting of an exclusive license under a patent.

No decision of this or any other Court has held that the mere granting of an exclusive license is per se a violation of the antitrust laws. The question was presented in *United States* v. *L. D. Caulk Co.*, 126 F. Supp. 693 (D. Del. 1954); but the court found no violation.

Benger has licensed Armour exclusively in the veterinary field. It has also given a license with the consent of Armour to Fort Dodge Laboratories in this field. There is no specific limitation in the Armour agreement that Benger and Armour must agree upon future licensees, but it is contended, and the parties believe, that this is the legal effect thereof. Fort Dodge has no veto power of any kind. Armour and Fort Dodge may sell to whom and wherever they please at whatever terms and prices they desire.

There is no restriction on competition beyond that necessarily arising from the legal implications of the patent. In *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304, 310, 311 (E. D. Mich. 1951) relied upon by petitioner, it was expressly held that an exclusive license was *not* per se a violation of the antitrust laws. It was only the general conduct of the parties which, in those cases, produced a violation of the act.

It is perfectly plain from *Besser Mfg. Co.* v. *United States*, 343 U. S. 444 (1952), that a violation of the anti-trust laws which included an improper license, would not prevent a recovery on the patent. On the contrary, the Court simply directed that other licenses be granted. It did not hold that an intringer was to be absolved from its infringement. Petitioner seeks absolvement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. MERRIAM,
JEROME B. KLOSE,
30 West Monroe Street,
Chicago 3, Illinois.
Attorneys for Petitioners.